LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 9 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 811

MORRELL J. RODDY, *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, and the ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY FOR PETITIONER

CHARLES E. ROBBINS
983 National Press Bldg.
Washington 4, D. C.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 811

MORRELL J. RODDY, *Petitioner*,

v.

CIVIL AERONAUTICS BOARD, and the ADMINISTRATOR OF THE FEDERAL AVIATION AGENCY, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

REPLY FOR PETITIONER

The central contention of the petitioner is that the effect of *ex parte* letters such as those involved here cannot be gauged. We submit that it is hardly likely that any pilot whose livelihood is at stake would view the letters other than prejudicial in the extreme. The penalty imposed suggests they were prejudicial. The examiner, who heard the evidence, concluded that the severe penalty imposed by the Board was unwarranted.

It is true that a failure to serve may often be rectified, under judicial safeguards, by later service. Here, however, the failure to serve involved a deficiency on the part of the Federal Aviation Agency, which is charged with prosecuting air safety actions before the Board, a quasi-judicial administrative agency. The Federal Aviation Agency is clothed with an authority which the ordinary litigant does not possess. In *Berger* v. *United States*, 295 U.S. 78 (1934), the Supreme Court said: "The United States Attorney is the representative of not an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . . ."

In *Sangamon Valley Television Corporation* v. *Federal Communications Commission*, 358 U.S. 49 (1958), reversing 255 F. 2d 191 (D.C. Cir. 1958), the Supreme Court remanded a proceeding to the Federal Communications Commission because *ex parte* attempts to influence the Commissioners had been made. After remand and a second decision by the Commission, an appeal was made to the Court of Appeals of the District of Columbia Circuit. The Court remanded to the Commission again after finding certain *ex parte* communications had been made to the Commission in violation of an order of the Commission. The Court said:[1] "Interested attempts to influence any member of the Commission . . . except by the recognized and public processes go to the 'very core of the Commission's quasi-judicial powers . . .' " citing *Massachusetts Bay Telecaster, Inc.* v. *Federal Communications Commission*, 104 U.S. App. D.C. 226, 261 F. 2d 55, 67 (1958).

---

[1] 269 F. 2d 221 (D.C. Cir. 1959).

The Court further stated: "We agree also that the Commission proceeding must be reopened for another reason. Agency action that substantially and prejudicially violates the agency's rules cannot stand," citing *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 74 S. Ct. 499, 98 L. Ed. 681 (1954); *Service* v. *Dulles*, 354 U.S. 363, 372, 373, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957); *Jefferson Amusement Company* v. *Federal Communications Commission*, 96 U.S. App. D.C. 375, 226 F. 2d 277 (1955); *American Broadcasting Company* v. *Federal Communications Commission*, 85 U.S. App. D.C. 343, 348-349, 179 F. 2d 437, 442, 443 (1949).

In *Accardi*, a deportable alien's application for suspension of deportation was denied by the Board of Immigration Appeals. The alien applied for habeas corpus, alleging that the denial of his application by the Board was prejudged through the issuance by the Attorney General, prior to the Board's decision, of a confidential list of "unsavory characters" including the alien's name, which made it impossible for him to secure fair consideration of his case. It was held that the alien was entitled to prove his allegation that the decision against him had been improperly influenced by the Attorney General. Any distinction between the Attorney General, in that case, and the Administrator here, is elusive to say the least.

In *Sangamon* one of the litigants had violated an express order of the Commission inviting comments but restricting them to a certain time period. The language of the Court in that case is sufficiently strong to indicate that any attempted *ex parte* influence is sufficient to vitiate a proceeding.

The Chairman of the Board conceded that "the Board cannot properly consider (the Administrator's) letters" C.R. 23. The letters nevertheless were considered and an attempt was made to "cure the legal deficiencies." It follows that regulations were violated both by the Administrator and the Board. The results were disastrous to the petitioner.

With respect to the contention of the Board that the petitioner was not timely in raising the issue of *ex parte* influence, the Supreme Court has ruled that objections made at any point before the agency of original jurisdiction is timely. *Bridges* v. *Wixon*, 326 U.S. 135, 152 (1944). Petitioner's contentions were presented to the Board on reconsideration, an integral part of the proceeding, provided for by Board rules.

North Central Airlines, Inc. v. *Civil Aeronautics Board*, 265 F. 2d 581 (1959), certiorari denied, 360 U.S. 903 (1959), cited by respondent, does not deal in any way with *ex parte* communications, and has no applicability to the issue raised here.

CONCLUSION

Certiorari should be granted in the interests of protecting the public confidence in the integrity of the administrative process.

Respectfully submitted,

CHARLES E. ROBBINS
983 National Press Bldg.
Washington 4, D. C.
Counsel for Petitioner